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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1995

WILLIAM J. FRIED

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

DAVID M. McGLAUGHLIN
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89 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether there was insufficient evidence to justify a rational trier of fact to find the petitioner guilty beyond a reasonable doubt where voluminous evidence was presented in total contravention of the Commonwealth's sole witness, and which served to undermine the witnesses' credibility, which would violate the due process clause of the 14th Amendment to the United States Constitution?

II. Whether the petitioner was denied due process under the 14th Amendment to the United States Constitution and his right to a fair trial under the 6th Amendment where the trial court permitted allegations of uncharged misconduct totally unrelated to the charges in

question?

III. Whether the petitioner was denied due process and a fair trial guaranteed by the 14th and 6th Amendments to the United States Constitution where the court precluded evidence that the sole Commonwealth witness had brought false charges previously on which prosecution was declined?

IV. Whether the petitioner received ineffective assistance of counsel under the 6th Amendment of the United States Constitution to his great prejudice and which seriously undermined the reliability of the verdict where counsel failed to file an alibi notice as required by Pennsylvania state rules causing crucial alibi evidence to be precluded?

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TABLE OF CONSTITUTIONAL PROVISIONS

1. 6th Amendment - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 14th Amendment - Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which all abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF JURISDICTION

This petition for certiorari is filed pursuant to the authority of 28 U.S.C. §1257. The jurisdiction of the Superior Court of Pennsylvania was invoked pursuant to the authority of 42 Pa.C.S.A. §742. A petition for allowance of appeal was filed in the Supreme Court of Pennsylvania pursuant to the authority of 42 Pa.C.S.A. §724.

STATEMENT OF THE CASE

This was a criminal prosecution by the Commonwealth against Petitioner William J. Fried, in the Montgomery County, Pennsylvania, Common Pleas Court. Mr. Fried waived his right to a jury trial and was tired before Judge Albert R. Subers. After a six-day bench trial, Judge Subers, on August 17, 1992 found Mr. Fried guilty of statutory rape 18 Pa.C.S. §3122; corrupting morals of a minor §6301; indecent assault §3126; involuntary deviate sexual intercourse §3125; and indecent exposure §3127. R.967a-968a.

The trial court denied all of Mr. Fried's posttrial motions on August 12, 1993. All issues contained in this petition were preserved. On October 22, 1993 the court

sentenced Mr. Fried to 5 to 10 years incarceration in a state correctional institution for involuntary deviate sexual intercourse, 5 years probation for statutory rape to run consecutively, 2 years probation for corruption of minors concurrent to the probation for rape, and 1 year probation for indecent exposure concurrent to the probation for rape. R.969a-970a.

A timely notice of appeal was filed on November 1, 1993.

The complainant, David Maynard, alleged sexual incidents at three over-night Boy Scout camping trips involving Mr. Fried, who was the Scoutmaster of Troop 124 to which Maynard belonged.

The first incident allegedly occurred on

January 7-8, 1989 when Maynard, 10 to 15 other boys from Troop 124, three of their fathers, and Mr. Fried went to Camp Laughing Waters in Montgomery County, Pennsylvania. R.94a, 491a, 499a, 504a, 507a.

Maynard testified he was alone with Mr. Fried in the only cabin at the campsite for one hour "sometime between 3 and 5pm." R.96a-97a. One of the fathers, four Scouts, as well as Mr. Fried testified that petitioner was outside the cabin and that another father was inside the cabin all afternoon watching television on a small portable T.V. R.496a, 498a-508a, 511a, 514a, 623a, 628a, 631a-635a, 708a-709a, 744a-745a, 756a, 758a-760a, 851a-852a, 857a-858a, 864a, 884a-887a.

Maynard said he lay on his side on the

cabin floor and Mr. Fried sat on a bench talking for 10-15 minutes. Fried than lay next to Maynard face-to-fact and talked of "a secret, special relationship" of a sexual nature. R.98a, 158a-159a.

Maynard said Fried had him perform oral genital sex on Fried and then Fried did the same to Maynard. R. 102a-106a.

After the incident, no other person entered the cabin for 30-45 minutes. Maynard did not tell anyone about the incident until 1990. R.106a, 117a.

The second alleged incident occurred February 4-5, 1989 at Camp Ockanickon in Bucks County, Pennsylvania. Maynard's allegations resulted in criminal charges being filed in Bucks County, Pennsylvania. R.213a-214a.

The Bucks County charges had been dismissed when the present trial began in Montgomery County. R.36a, 63a. At the present trial two parents testified that Fried never went on the Camp Ockanickon trip. R.515a-516a, 694a-695a. The Bucks County charges were dropped when the District Attorney of Bucks County investigated and verified Mr. Fried's alibi.

The third alleged incident occurred at Hart Scout Reservation in Montgomery County on March 11-12, 1989. Maynard, about 10 other scouts, two fathers, and Mr. Fried went on that trip. R.108a-109a.

Maynard claimed he was alone in the only cabin with Fried between 3 and 5pm, and the incident happened after 4pm and ended after

5pm, or around 5:30pm, and lasted 45 to 60 minutes. R.110-111a, 114a, 205a.

Three scouts, one father, as well as Mr. Fried testified that Maynard was outside the cabin on the porch with two other boys and Fried learning the skills for the first aid merit badge between 3pm and 4:40pm. Afterwards, dinner prep began in which Mr. Fried supervised all the boys inside the cabin. R.529a, 533a, 648a, 649a, 653a, 724a-726a, 772a-773a, 892a-898a.

Five witnesses testified that Maynard did not leave the porch before dinner prep, and that the other boys were in the cabin during dinner prep. R.534a-536a, 648a-649a, 653a, 724a-726a, 772a-776a, 892a-898a.

One of the fathers, Stuart Rudnick, took

a series of photographs of the Camp Laughing Waters and Hart Scout Reservation trips which were admitted into evidence as Exhibit D-10. One photograph of the Hart Reservation trip shows Maynard, Fried, and two other boys sitting outside the cabin on the porch discussing the skills for the first aid merit badge at the same time Maynard claims the incident occurred inside the cabin. This was consistent with the testimony. R.524a, 529a-31a, 587a-88a. Maynard did not tell anyone of this incident until 1990. R.112a-115a, 117a.

After the March, 1989 trip to Camp Hart, Maynard went on 10 other overnight camping trips with Troop 124 and Mr. Fried. There were no sexual incidents of any kind of those trips. R.115a-16a.

Maynard stopped going on these trips after Mr. Fried refused to promote him to the rank of star scout because Maynard had not fulfilled all the requirements. R. 545a-546a. Around that time Maynard was advised by Mr. Fried that he was not elected to the Order of the Arrow creating even greater animosity.

Mr. Fried presented evidence of his good character and reputation in the community for truthfulness, decency, law-abidingness and non-aggressiveness from 29 witnesses. R.831a-844a., many of whom had entrusted their children to his care in Boy Scouts.

The trial court denied post trial motions and issued an opinion which in places simply ignores the law. Appendix 'A'. On appeal to the Superior Court of Pennsylvania, that court

affirmed the judgement of sentence, virtually ignoring the law as well as the overwhelming factual evidence raising reasonable doubt as to Mr. Fried's guilt. Appendix 'B'. In so doing they simply adopted the lower court opinion.

A petition for allowance of appeal was filed in the Supreme Court of Pennsylvania and was denied on November 30, 1995. This Petition for Certiorari is now filed on his behalf.

ARGUMENT

I. When counsel was first exposed to the case of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), as a freshman state prosecutor in Pennsylvania, counsel could hardly envision a case reaching the federal courts after one or more levels of state review, where a finding could be made that no rational trier of fact could have found sufficient evidence to convict a state criminal defendant. This is, however, such a case. In this case the sole Commonwealth witness, the victim of the alleged sexual conduct, not only presented testimony with myriad conflicts and unrecalled details, but had previously accused the petitioner, only to have alibi evidence on that occasion confirmed

by independent investigation and the charges dismissed.[1]

Further, Mr. Fried presented the testimony of independent and disinterested witnesses including other adults on the boy scout camping trips in question and other boy scouts, all of which made it practically, if

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[1] While counsel can point to no exact place in the record of the case where a claim of the violation of the due process clause of the federal constitution was made, is that not the source of all claims of insufficiency of evidence? Where else will such a claim sound in the law in any case? Certainly, encompassed in any claim of error in any state proceeding, particularly one surrounding the very sufficiency of the evidence to convict, it is a due process claim centered on the 14th Amendment to the United States Constitution. Must those exact words be used in the case in order to preserve such an issue? Clearly they need not, as Mr. Fried has consistently throughout this case challenged the sufficiency and weight of the evidence to convict him.

not actually impossible for Mr. Fried to have committed the offenses in question. Multiple character witnesses were also presented.

Incredibly, it was the quality of the defense witnesses, their preparation and their recollection which the trial judge used adversely to the petitioner and to support a finding of guilt. Not only is this incredible, it is ludicrous. Such reasoning makes a mockery of the presumption of innocence, and serves to illustrate far better than any conjured example how no rational trier of fact could have possibly found sufficient evidence to convict this man of sexual offenses.

For instance, the uncontradicted testimony of Jerry Lebowitz was that he was in

the sole cabin at Camp Laughing Waters the entire time the alleged sexual incident was to have taken place with the exception of short trips to the latrine. (R 499A, 502A, 504A, 507A, 514A, 708A, 744A, 745A, 759A, 844A). How could it be possible, then, for Mr. Fried and the complaining witness to have had a sexual encounter in a one room cabin with an independent eyewitness present who saw nothing?

In stark contrast, the complaining witness kept changing his story between the initial reports and trial and even testified that he went on numerous camping trips subsequent to the alleged incidents. Why, if he was sexually abused as he claims, do this?

All of these factors combine to quite

clearly demonstrate that no rational trier fact could have found the defendant guilty under these facts and circumstances, and that Mr. Fried's due process rights under the 14th Amendment to the United States Constitution were seriously violated by this verdict.

II. In Pennsylvania, when ruling upon the admissibility of evidence under the common plan exception, the trial court must first examine the details and surrounding circumstances of each criminal incident to assure that the evidence reveals criminal conduct which is distinctive and so nearly identical to the crime charged and being tried as to become like a signature of the same perpetrator. Note *Commonwealth v. Frank*, 395 Pa Super 412, 577 A.2d 609, Allocatur denied

526 Pa 629, 584 A.2d 312 (1990). Before a Pennsylvania court may admit such evidence, it must be demonstrated that there is a logical connection between the two crimes, and there must be a high correlation in the details of each. *Commonwealth v. Kasko*, 322 Pa Super 62, 469 A.2d 181 (1983).

In this case, the so called other crimes evidence, (which never resulted in criminal charges) was vastly different from the allegations which were the basis of the trial charges. Testimony from 5 other boy scouts related to nothing more than juvenile games where the boys were allegedly touched in the genital area in a fleeting or brushing nature all in the presence of each other and while fully clothed. Moreover, during these

frolics, other boys and adults were present with the boys who testified. This is a far cry from the allegations of oral sex which formed the basis of the trial in this case.

Moreover, it is clear from the perfunctory and summary manner in which the lower court opinion was adopted by the Superior Court that little if any serious and in depth review of the issues and facts contained in this case was performed by the Superior Court, let alone an analysis of the precedents which so clearly compelled a reversal. The Superior Court did little more than 'rubber stamp' the lower court opinion.

III. In this case, Mr. Fried sought to introduce evidence that allegations of similar sexual conduct on the part of Mr. Fried which

resulted in charges in a neighboring county where dismissed after authorities independently investigated Mr. Fried's alibi and found it to be substantiated.

The single most important issue in the case was the credibility of the sole Commonwealth witness. Certainly, prior false allegations of similar conduct on the part of this witness weigh heavily upon that credibility determination. Pennsylvania law required a full assessment and full revelation of the basis upon which the Bucks County charges were dismissed. *Commonwealth v. Haddock*, 415 Pa Super 603, 609 A.2d 1387 (1992).

The fact that the complaining witness falsely accused Mr. Fried of the same acts at

or about the same time as the crimes at issue occurred it highly relevant and weighs heavily against his credibility. Plainly stated, Mr. Maynard lied. In fact, it was the most important factor in the case. His action was actually a crime pursuant to 18 Pa.C.S.A. §4906 relating to false reports to law enforcement authorities. Evidence of such a false report is clearly admissible. In fact, in the Third Circuit, evidence that a defendant had falsified facts on a marriage license application was admissible for impeachment purposes. *United States v. Beros*, 833 F.2d 455 3rd.Cir. (1987).

Thus, the lower court violated not only Pennsylvania law, but federal law in refusing to permit full exploration of the reasons why

previous allegations of sexual misconduct on the part of the petitioner were dismissed after an independent investigation confirmed those allegations to be false.

This constituted a gross violation of Mr. Fried's due process and fair trial rights under the Federal Constitution.

IV. Under the land mark case of *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d, 674 (1984), counsel can be deemed ineffective if their errors are so egregious that the prejudice generated thereby affects the reliability of the verdict. In this case, it is beyond question that important and vital alibi evidence was precluded pursuant to a Commonwealth motion, on the basis that trial counsel had failed to

comply with Pa.R.Crim.P. 305, which requires the pretrial filing of an alibi notice.

The importance of alibi testimony cannot be overestimated. For example, in 1992, several companion Commonwealth cases were decided which related to the importance of alibi evidence. *Commonwealth v. Saunders*, 529 Pa. 140, 602 A.2d 816 (1992), *Commonwealth v. Jones*, 529 Pa. 149, 602 A.2d 820 (1992), *Commonwealth v. Pizzo*, 529 Pa. 155, 602 A.2d 823 (1992) and *Commonwealth v. Roxberry*, 529 Pa. 160, 602 A.2d 826 (1992). In this case, alibi evidence existed which placed Mr. Fried someplace other than inside the single cabin at each location between 3 and 5pm on the days in question, the time David Maynard, said the incident occurred. In other words, between 3

and 5pm, alibi witnesses existed, and which could testify, which placed Mr. Fried somewhere other than inside the cabin with the complaining witness as he claimed. Simply stated they would have established Maynard lied again. Moreover, because these witnesses were independent and unrelated to Mr. Fried their testimony would have been compelling. In this case, the trial court claimed Mr. Fried did not suffer any prejudice because he was able to present evidence as to Maynard's location during the crucial time periods. However, this misses the entire point. Rather, the Superior Court and the lower court again ignored established Pennsylvania Law in the guise of *Commonwealth V. Bulard*, 305 Pa. Super 502, 451 A.2d 760

(1982), where the Superior Court found, in a non-jury trial, counsel was seriously ineffective in failing to provide the Commonwealth with sufficient notice pursuant to Pa.R.Crim.P. 305 in order to allow his alibi evidence to be presented.

Because this evidence was compelling, and because its admission would have seriously affected the outcome of the verdict in favor of the petitioner, counsel can have no reasonable basis designed to effectuate Mr. Fried's interest in failing to follow the Pennsylvania rule and file the appropriate alibi notice. This failure constitutes gross constitutional ineffectiveness under the federal constitution and clearly satisfies the requirements of *Strickland v. Washington*,

supra. The petition should be granted.

CONCLUSION

For the above cited reasons and circumstances, the petitioner, William J. Fried, respectfully requests this Honorable Court grant his Petition for Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 514 E.D. ALLOCATUR DKT. 1994
vs.	:	
WILLIAM J. FRIED, PETITIONER	:	Petition for Allowance of Appeal from the Superior Court

ORDER

PER CURIAM:

AND NOW, this 30th day of November, 1995, the Petition for Allowance of Appeal in the above matter is denied.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701 (f).

TRUE COPY FROM RECORD
Attest: November 30, 1995

Patricia Johnson
Chief Clerk

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 03526 PHL 1993
WILLIAM J. FRIED, Appellant	:	

Appeal from the Judgement of Sentence October 22, 1993 In the Court of Common Pleas of Montgomery County Criminal Division, No. 06251-91

Before: CIRCILLO, JOHNSON and CERCONE, JJ.

JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgement of the Court of Common Pleas of Montgomery County be, and the same is hereby AFFIRMED.

By the Court:

David A. Szewczak

PROTHONOTARY

Date: May 23, 1994

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 03526 PHL 1993
WILLIAM J. FRIED, Appellant	:	

Appeal from the Judgement of Sentence October 22, 1993 In the Court of Common Pleas of Montgomery County Criminal Division, No. 06251-91

Before: CIRCILLO, JOHNSON and CERCONE, JJ.

MEMORANDUM:

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Montgomery County, dated October 22, 1993, after appellant, William Fried, was convicted of one count each of statutory rape,[1] corruption of the morals of a minor,[2] indecent

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[1] 18 Pa. C.S.A. §3122.

[2] Id. §6301.

assault,[3] and involuntary deviate sexual intercourse[4] in connection with the sexual assault of a minor. We affirm.

The trial judge, the Honorable Albert R. Subers, aptly summarized the facts and procedural history of this case in his opinion, dated December 14, 1993, and we need not repeat them here. Appellant raises the following seven issues for our review:

1. Where the verdicts against the weight of the evidence?

2. Did the trial court err in admitting evidence of other alleged sexual conduct by the defendant? continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

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[3] Id. §3126.

[4] Id. §3123.

Pa.R.Crim.P. 305(E), 42 Pa.C.S.A. (emphasis added). Under Rule 305(E), a motion to strike for failure to provide notice of alibi is proper at any time during the course of the trial. Therefore, the Commonwealth's motion to strike was not untimely.

In his fifth claim, appellant argues that the trial court erred by prohibiting him from cross-examining the victim concerning the dismissal of similar charges against him [appellant] in Bucks County which were based on the victim's accusations. Nonetheless, the record contradicts the appellant's allegation. The victim testified, without objection from the Commonwealth, that the Bucks County District Attorney dropped the charges against appellant. N.T. 8/11/92 at 161.

Judgment of sentence affirmed.

APPENDIX "B"

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
v.	:	No. 06251-91
WILLIAM J. FRIED	:	

OPINION

SUBERS, J. DECEMBER 14, 1993

HISTORY OF THE CASE

This is an appeal by the defendant, William J. Fried, from his conviction on August 17, 1992, after a six-day bench trial, of statutory rape[1], 3122, corruption of the morals of a minor[2], indecent assault[3], and involuntary deviate sexual intercourse[4].

1. 18 Pa.C.S.A. §3122.
2. 18 Pa.C.S.A. §6301.
3. 18 Pa.C.S.A. §3126.
4. 18 Pa.C.S.A. §3123.

On October 1, 1991, the defendant was arrested by Montgomery County Detectives and charged with the afore-mentioned sexual offenses committed against David Maynard. At the time of these crimes, on January 7, 1989 and March 11, 1989, the defendant was the Scoutmaster for Boy Scout Troop #124. David Maynard, the victim, at the time of the first incident was eleven (11) years old and a member of this Boy Scout Troop.

On January 7, 1989, Boy Scout Troop #124 went on an overnight camping trip to Camp Laughing Waters in Montgomery County. Between ten (10) and fifteen (15) boys and at least two adults, including the defendant, went on this trip. The group stayed in a large, two-room cabin. Between three (3) and five

(5)p.m. on January 7 the defendant and the victim were alone in the cabin. The defendant was sitting on a bench while the victim was lying on the floor. They were engaged in casual conversation.

After about ten to fifteen minutes the defendant moved from the bench and onto the floor so that he was lying next to the victim, face-to-face. The conversation was of a sexual nature. The defendant talked about a "secret, special relationship". The defendant pushed his own pants and underpants down and had David Maynard perform oral genital sex on him until the defendant ejaculated. The victim pulled his own pants down and after the defendant ejaculated, the defendant performed the same type of oral genital sex on Maynard.

Afterwards, both individuals pulled up their pants. A short time later the Troop returned to the cabin. Maynard did not tell anyone about this incident at that time.

On March 11, 1989, about ten (10) members of Troop 124 and several adults, including the defendant went on an overnight camping trip to Hart Scout Reservation in Montgomery County. Again, between three (3) and five (5)p.m., the defendant was alone with David Maynard in the cabin in which the majority of the Troop was staying. Once again, while both were lying on the floor, the defendant talked about continuing the "special, secret relationship". Both pulled their pants down and then the defendant had David Maynard perform oral genital sex as before. Afterwards, the

defendant performed the same act on Maynard. Approximately fifteen minutes later other members of the Troop entered the cabin. David Maynard did not tell anyone about this incident at that time.

Eventually, the authorities were informed about these incidents. The defendant was arrested on October 1, 1991. On October 11, 1991, District Justice Catherine Hummel presided over a preliminary hearing at which all charges were held over for disposition by the Common Pleas Curt. The defendant was tried at a bench trial beginning on August 10, 1992 and ending on August 17, 1992. The defendant made a timely Motion for New Trial and In Arrest of Judgment on August 21, 1992. The defendant then fired his trial counsel and

hired a new attorney to handle the post-trial representation. The defendant filed supplemental Motions in Arrest of Judgment and for New Trial on February 16, 1993. These Motions were denied on August 12, 1993. On October 22, 1993, the defendant was sentenced to sixty (60) to one hundred and twenty (120) months incarceration in a state correctional institution for involuntary deviate sexual intercourse, sixty (60) months probation for statutory rape to run consecutively to that sentence, twenty-four (24) months probation for corruption of minors to run concurrently to the probation, and twelve (12) months probation for indecent exposure to run concurrently to the probation. On Motion by defendant, he was released on bail pending

appeal. The defendant now appeals.

ISSUES

1. Was this Court's verdict against the weight of the evidence?

2. Did this Court err by permitting testimony under the theory of "common scheme, plan and design"?

3. Did this Court err in striking the alibi testimony of Steward Neil Rudnick?

4. Did this Court err in denying Defendant's pretrial request for the records of Dr. Ruth Sefarbi?

5. Did this Court err by not allowing testimony that similar charges previously brought in another county were "dropped"?

6. Did the Court err in restricting the cross-examination of David Maynard about his prior acts of sexual misconduct?

7. Was defendant's trial counsel ineffective for the following reasons:

A. Trial counsel failed to file a notice of alibi?

B. Trial counsel failed to file pretrial motions for discovery?

C. Trial counsel failed to provide the Commonwealth with timely notice of his intention to call an expert?

D. Trial counsel failed to raise the issue of Dr. Sefarbi's status under 42 Pa.C.S.A. §5944 and §5945.1?

DISCUSSION

The defendant first argues that the verdict of this Court was against the weight of the evidence. It is well established that it is the province of the trier of fact to pass upon the credibility of the witnesses and the weight to be accorded the evidence produced. The fact finder is free to believe all, part or none of the evidence. Commonwealth v. Stockard, 489 Pa. 209, 212-213, 412 A.2d 1088, 1090 (1980); Commonwealth v. State, 485 Pa. 180, 401 A.2d 353 (1979). Before a Court will award a new trial on the grounds that the verdict winner was against the weight of the evidence, it must appear from the record that the verdict was so contrary to the evidence as to shock one's sense of justice and to make the award of a

new trial imperative, so that right may be given another opportunity to prevail. Commonwealth v. Torres, 396 Pa. Super. 499, 578 A.2d 1323 (1990); Commonwealth v. Barnhart, 290 Pa. Super. 182, 434 A.2d 191 (1981).

The verdict in the case at bar was not against the weight of the evidence. The determination of guilt in this case hinges on a credibility determination. On one hand, David Maynard testified that these acts occurred between three (3) and five (5)p.m. On the other hand, a plethora of defense witnesses testified that Maynard could not have been alone in the cabin, with the defendant, during those times. The defendant would have us believe that his witnesses,

including himself, were more credible because they all presented detailed, specific (and practically identical) testimony while David Maynard remembered virtually nothing about the two trips except for the two sexual encounters with the defendant. However, it is the amazing memory and similarity of testimony of all defense witnesses that undermines their credibility.

First, we consider the January 7 trip to Camp Laughing Waters. The Court notes that Maynard did have trouble remembering many details of this trip. However, such limited recall of minute details of events which occurred two and a half (2 1/2) years before can be logically expected from a boy who was 11 years old when this incident occurred.

Moreover, such specific details get overshadowed by a larger, traumatic event such as this "secret, special relationship" with the defendant. As to this, David Maynard does remember more detail. His demeanor and testimony convinced this Court that he was telling the truth.

Yet, the defendant asks how he can be believed "over the specific and detailed testimony of Mr. Neil Wortman, Mr. Stuart Rudnick, Todd Rudnick, Michael Friedman, Steven Katz, Abraham Borvetsky, and Mr. William Fried." (Defendant's Memorandum of Law in Support of Post-Verdict Motions, hereinafter referred to as "D.M.", p. 30). Normally, when witnesses remember an event in a similar fashion it is likely that the event

occurred in that way. However, everyone remembers events differently. It is rare that an event, especially one that occurred a long time ago or one that is significantly complicated will be remembered almost identically by all involved. The odds against exact and accurate recall increase immensely when the event occurred two and a half (2 1/2) years ago and the majority of witnesses were only young boys of eleven (11) to fifteen (15) years old. It defies logic that all witnesses could independently remember such an event in a nearly identical, detailed manner. Such is the case at bar.

The defendant would have this Court believe that seven witnesses all independently remembered January 7, 1989, from the time they

arrived, what and when every event occurred, what they ate, who was where, and when, etc. In this case, however, such an amazing feat by those seven witnesses is easily explained. Todd Rudnick testified that he met with the defendant's trial lawyer four times for one to two hours each time, in the presence of Steve Katz, Mike Friedman, their parents, Neil Rudnick, an investigator, and the defendant. (Notes of Testimony, hereinafter "N.T.", Volume 3, p. 74-75). At these meetings all the witnesses and the defendant would discuss the case. (N.T., Vol. 3, pa. 76). They looked at the photo album to "refresh (their) memory." (N.T., Vol. 3, p. 81). They also met as a group two or three days before trial. (N.T., Vol. 3, pa. 75). Thus, such

independent recollection was not at all independent. The witnesses discussed the case together, went over photographs together, and filled in their memory gaps by collectively trying to piece together the events of that day, all in the presence of the defendant. The result is a collective memory of January 7, 1989, pieced together with the aid of those fate depended of these memories.

The defendant appeared to believe that there was strength in numbers, having many witnesses recite the exact same story so that the evidence would be overwhelming and uncontradicted. In light of Todd Rudnick's testimony, this Court is unable to find this testimony credible.

This conclusion is also borne out by

considering specific instances, testimony, and documentary evidence introduced at trial. The photographs and testimony put a large chink in the avowed impenetrable armor or truth that the defendant claims was found in the testimony of all the defense witnesses. First, the defendant argues that Maynard did not even remember snow on the ground while all the defense witnesses remembered snow and Defendant's Exhibit D-10 "clearly shows snow on the ground." (D.M., p. 31). In fact, the defendant maintains that the Troop performed a lost child search by burying one of the troop members in a plastic bag in the snow. But as Exhibit D-10 shows, while there was snow, there was not enough to even cover the entire ground, let alone a young boy and

not the four to six inches of snow testified to by Stuart Neil Rudnick. (N.T., Vol. 2, p. 183).

Likewise, the Defendant fervently argues that it is implausible that the defendant and Maynard had oral sex on the cabin floor because the floor was wet and muddy. However, this argument holds merit only if it can be believed that the entire cabin floor was in fact muddy and wet. While some snow may have been tracked inside the cabin, it is doubtful that the entire floor was wet. In fact, the pictures in Defendant's Exhibit D-10 not only show a dry floor but also show several individuals in the cabin wearing only socks on their feet. If the entire floor was wet, as the defendant maintains it is highly unlikely

that the boys would be running around in only their socks.

At Hart Scout Reservation on March 11, 1989, the defense's case relies on two main evidentiary and testimonial points. First, that the entire troop was at the rifle range in the early afternoon from approximately 1:30 to 3:30 and that David Maynard was on the cabin porch learning a skill from approximately 4:15 to 5:00. If believed, there would then be no time for the defendant and Maynard to have been alone in the cabin. However, the Troop was not at the rifle range in the afternoon. Mr. John Hopkins testified that he was the Camp Master at Hart Scout Reservation and that he had prepared a Report and Schedule showing that the rifle range was

only open from 9a.m. to 12:30p.m. that Saturday. (N.T., Vol. 4, p. 10-11). He testified that the range could not have been open in the afternoon. (N.T., Vol. 4, p. 11). If it had been specially reopened for a Troop, which the defendant maintains happened, he would have marked it on the schedule sheet. (N.T. Vol. 4, p. 12, 26). Although he does not remember the specific day in question he did say that any change would have been noted. On cross-examination, Mr. Hopkins admitted that it was remotely possible that he failed to write down any change and, in that case, it would have been possible for Troop 124 to have been there in the afternoon. (N.T., Vol. 4, p. 20). Relying on the report and veracity of Mr. Hopkins in this testimony that any change

would more than likely have been written down, this Court found that the rifle range was not open in the afternoon.

One other observation supports this conclusion. While the defendant argues that Mr. Hopkins might have forgotten to mark the afternoon re-opening of the rifle range, the same argument was not made about the trading post. The defendant argues that after the rifle range the troop went to the trading post, at approximately 3:45p.m., the earliest possible time being 3:15p.m. According to the Campmaster Report and Schedule, the trading post was open from 10 to 11 a.m. and from 2 to 3 p.m. (Commonwealth Exhibit #2). Therefore, the trading post was not even open when the troop was allegedly there and there was no

testimony or argument that it was also re-opened specially for Troop 124.

As to the skill lessons on the porch they could have occurred anytime during the afternoon rather than between 4:15 and 5:00 p.m. The defendant's contention is supported by a picture. But, the picture introduced by the defendant gives no clue as to the time of day that it was taken. The only evidence of time was from the testimony of the defense witnesses. Since it was found that their timing of the rifle range was inaccurate and other testimony was not credible, this Court found that the teaching of the skill on the porch could have occurred at times to the than 4:15 to 5:00 p.m.

Finally, this Court notes that much of

the detailed memory testified to by the numerous witnesses can also be found in the photographs and refreshed thereby. The peach cobbler, the rifle range, and the lunch cooked were all photographed and all these events were testified to in detail. However, without the pictures the witnesses memories were not so clear. For example, the only people that these witnesses could remember at the rifle range were the one's they could see in the pictures. Otherwise, they could not remember who else was on this trip. Likewise, while the defendant could remember exactly what was in his foil burger for lunch, of which there is a picture, he could not remember what he had for dinner that same evening. (N.T., Vol. 4, p. 117). Thus, it would seem that the

pictures played an important part in these witnesses recollection of this weekend. Interestingly enough, there are no pictures of the lost child search, the football game, or of Jerry Liebowitz. After going on one trip a month for a long period of time the witnesses confused events with different weekends so that the collective memory derived from these numerous meetings was not the actual sequence of events from these two particular trips. The prosecution met its burden in proving beyond a reasonable doubt that the criminal acts in issue did occur. Therefore, the verdict was not against the weight of the evidence.

The second issue raised by the defendant is that the Court erred in permitting the use

of testimony under the theory of "common scheme, plan and design." The testimony at issue was given by John Saltzgueber, Adam Gill, Rhett Andrew Akers, David Joshua Chaplin, and Andrew Michael Seder. The testimony of these young boys described certain inappropriate touching by which the defendant tickled him on his back while John was lying on his stomach. (N.T., Vol. 1, p. 192). Less than a minute later, the defendant started tickling John again, but this time moving lower on John's back. (N.T., Vol. 1, p. 192). The defendant then lowered his hands to John's waist area, down the sides of John's waist, and then he put his hands on John's groin area. (N.T., Vol. 1, p. 194-194). John told the defendant to stop and then threw off

the defendant's hands and went inside. (N.T. vol. 1, p. 194).

John also testified that he was trying to get a football away from the defendant the next morning when a tug-of-war developed over the ball. (N.T. Vol. 1, p. 194-95). While they were alone, the defendant managed to get John turned around so that John's back was against the defendant's stomach. (N.T., Vol. 1, p. 195-95). Then the defendant sat down, pulling John into his lap and trapping his arms. (N.T., Vol. 1, p. 196). The defendant then grabbed John's groin area. (N.T., Vol. 1, p. 198). At that moment another boy came out of the cabin and threw ice water on them and the defendant let go allowing John to get up and run off. (N.T., Vol. 1, p. 198).

Adam Gill testified that when he was 10 years old, at Camp Hart in November, 1989, he was in his sleeping bag when the defendant lay down next to him and began to tickle his ear. (N.T., Vol. 2, p. 9-10). The defendant then began to move his hands lower. (N.T., Vol. 2, p. 10). The defendant put his hand down inside Adam's sleeping bag and then down Adam's pants stopping just above the groin area. (N.T., Vol. 2, p. 11). Adam rolled away in his sleeping bag, ending the incident. (N.T., Vol. 2, p. 12).

Andy Akers testified that on many occasions the defendant would grab him, put his arms around him, pull him close, and put his hands below his belly button before moving them down right above Andy's genitals. (N.T.,

Vol. 2, pa. 24-25). Andy also testified that during a rope tying game, characterized by the defendant as a "common place Houdini tie-up game", the defendant tied Andy's hands to a bunk and then ran the rope down inside Andy's underwear at which point his hand was less than an inch from Andy's genitals. (N.T., Vol. 2, p. 28-31). David Chaplin corroborated this testimony when he testified that he saw the defendant grab Andy Akers below Andy's belly button and saw Andy Akers being tied up by the defendant. (N.T., Vol. 2, p. 86-90). Andrew Seder also testified that the defendant put his hands in Andrew's underwear during a rope tie-up game. (N.T., Vol. 2, p. 78-79.

The defendant contends that this evidence was erroneously admitted because it did not

constitute a "common plan, scheme or design." Whether evidence is admissible under the common plan, scheme and design exception must be made on a case by case basis in accordance with the unique facts and circumstances of each case. Commonwealth v. Frank, 395 Pa. Super. 412, 421, 577 A.2d 609, 614 (1990). "However, we recognize that in each case, the trial court is bound to follow the same controlling, albeit general, principles of law." 577 A.2d at 614. "[E]vidence of other crimes is admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the

crime on trial, - in other words where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1995); See also Commonwealth v. Bryant, 512 Pa. 473, 477-478, 530 A.2d 83, 85 (1987); Commonwealth v. Fortune, 464 Pa. 367, 373, 346 A.2d 783, 786 (1975).

> "[T]he trial court must first examine the details and surrounding circumstances of each criminal incident to assure that the evidence reveals criminal conduct which is distinctive and so nearly identical as to become the signature of the same perpetrator. Relevant to such a finding will be the habits or patterns of action or conduct undertaken by the perpetrator to commit crime, as well as the time, place, and types of victims typically chosen by the perpetrator. Given this initial determination, the court is bound to engage in a careful balancing test to

assure that the common plan evidence is not too remote tin time to be probative." Frank, 577 A.2d at 614.

In the case at bar, the common plan, scheme or design evidence involves several incidents where the defendant committed unauthorized and inappropriate sexual acts or touching on other members of Boy Scout Troop #124. These incidents possessed the following common and distinctive elements: (1) the sexual acts were perpetrated on young boys between the ages of ten (10) and thirteen (13); (2) each of the victims was a member of Boy Scout Troop #124: (3) the sexual acts all occurred on overnight camping trips: (4) the acts were performed while the defendant was in the authoritative position of Scoutmaster on these trips; (5) the acts were perpetrated

when other adults were absent; (6) the acts focused on touching the boys' genital area; (7) the defendant had repeated contact with the genital area of the same victims; (8) the acts occurred within one (1) year prior to and two (2) years after the instant offenses; (9) the sexual acts were almost always perpetrated in daylight hours; and (10) the defendant never threatened any of the victims. Like these acts, the acts perpetrated against David Maynard also occurred on overnight trips with the defendant as his Scoutmaster. They occurred outside the presence or vicinity of other adults, during daylight hours. David Maynard was eleven (11) years old and was never threatened by the defendant. Also, the act involved the genital area of David

Maynard. The similarity between these acts and the acts perpetrated against David Maynard is sufficient evidence of a common plan, scheme or design.

The fact that a sexual acts performed on and by David Maynard are different than the acts on these other victims does not obviate the use of this common plan evidence. As long as a legally substantial number of the elements of the entire act are the same, certain differences in the ultimate act do not eliminate the use of this evidence. Frank, 577 A.2d at 616-617. The only difference between the defendant's "methods" as relating to the other victims and his crimes against David Maynard is that he had David Maynard perform oral genital sex on him, and vice-

versa, while no oral genital sex was performed in the other incidents. This difference does not amount to such a change in circumstances that the other acts do not constitute a common plan, scheme or design. See Frank, 577 A.2d at 616-617.

Likewise, the acts involving this common plan, scheme or design are not too remote because they occurred within two years before and after the instant offenses. "Remoteness ... is but another factor to be considered in determining if the prior crime tends to show that the same person committed both crimes." Commonwealth v. Shively, 492 Pa. 411, 416, 424 A.2d 1257, 1259 (1981). Frank held that three (3) years, if probative, is not too remote. Frank, 577 A.2d at 617. Here, these acts were

an uninterrupted, continuous pattern or scheme by the defendant in his role as Scoutmaster on overnight Boy Scout camping trips. They were certainly probative. Also, since this was not a jury trial, but a bench trial, the possibility of prejudice was greatly reduced. Therefore, the probative value outweighed the prejudicial value and the evidence was properly admitted.

Third, the defendant argues that this Court erred in striking the alibi testimony of witness Stewart Neil Rudnick due to the Commonwealth's failure to timely object. The defendant contends that a Motion to Strike is too late when made after cross-examination and the day after the witness left the stand. The defendant relies on Commonwealth v. Weinegrad,

119 Pa. Super. 78, 82, 180 A. 160, 161 (1935), Commonwealth v. Comer, 167 Pa. Super. 537, 76 A.2d 233, 234 (1950), and Jones v. Spindle, 446 Pa. 103, 107, 286 A.2d 366, 367 (1971). These cases, however, involve the court's discretion to refuse a Motion to Strike and are therefore inapposite to the present case. Weingrad held that it was not error to refuse a Motion to Strike when made the day after the testimony. Weingrad, 180 A. at 161. Likewise, Jones held that it was not an abuse of discretion to refuse a Motion to Strike made after testimony. Jones, 286 A.2d at 368. Because a Court may refuse a Motion at its discretion does not preclude granting the Motion.

Even though Comer held that normally

answers admitted without objection cannot be stricken out, a Motion to Strike may still be granted in certain situations. Comer, 76 A.2d at 234. "Where evidence is admitted without objection and no motion is made to strike it out until ... after the close of the testimony, the motion is untimely." Oko v. Kryzanowski, 150 Pa. Super. 205, 215, 27 A.2d 414, 419 (1942). In the case at bar, Mr. Rudnick's testimony was completed at the end of a daily court session. Immediately following the testimony, the court closed for the day and resumed the following morning, at which time the Motion to Strike was made. At this time, the testimony was not closed and the motion, therefore, was not untimely and was properly granted.

Furthermore, the defendant's contention on appeal is moot because striking this testimony had no impact on the outcome of the case. The stricken testimony related to the whereabouts of the defendant between three (3) and five (5) p.m. on the days in question. While this alibi testimony was not allowed, the defendant was still able to put forth this impossibility and/or alibi defense because in order for these crimes to have occurred, the defendant and David Maynard had to be alone between three (3) and five (5) p.m. While the defense could not offer this testimony as to where the defendant was, it could, and did, offer testimony as to the location of David Maynard at the times in question. Thus, the defense testimony, if believed, would have

placed David Maynard with others at all relevant times and made it impossible for the defendant and David Maynard to have been alone, regardless of the testimony by Mr. Rudnick. Thus, the granting of the Motion to Strike did not prejudice in any way the defendant's ability to present an impossibility and/or alibi defense.

Fourth, the defendant argues that this Court erred in denying the defendant's pretrial request for the records of Dr. Ruth Sefarbi, a psychologist who treated David Maynard. 42 Pa.C.S.A.§5944 provides that confidential relations and communications between a licensed psychologist and his client are absolutely privileged. 42 Pa.C.S.A. §5945.1 provides that confidential

communications between a sexual assault counselor and her client are also absolutely privileged. The defendant contends that the prosecution had the burden of proving that Dr. Sefarbi was a licensed psychologist and/or a sexual assault counselor as defined in §5944 and §5945.1, respectively, We disagree. By statue these records are absolutely privileged. Records of psychological sessions not in the possession of the prosecution are presumably treatment and therapy records, and therefore, presumptively privileged. See Commonwealth v. Kennedy, 413 Pa. Super. 95, 115, 604 A.2d 1036, 1046 (1992). The party seeking the information has the burden of proving that he is entitled to it. Since the defendant offered no proof that the

psychological records were not privileged because Dr. Sefarbi was not licensed as required under the statute, the Court's denial of the defendant's discovery request was proper.

Fifth, the defendant contends that this Court erred in prohibiting the trier of fact from learning that similar charges were previously brought by David Maynard against the defendant and were "dropped" due to the fact that the defendant was not present when the acts allegedly occurred. David Maynard brought charges against the defendant for sexual acts which occurred in February, 1989 at Camp Ockanickon in Bucks County, Pennsylvania. These charges were dismissed by the Bucks County District Attorney after the

defendant presented pretrial alibi evidence. This Court ruled that David Maynard could be questioned about this incident but could not be asked the result of these charges. The Court permitted the defense to ask whether the Bucks County action had been "concluded", but not whether it had been "dismissed."

As the defendant points out, the defense is allowed to question the victim about these past allegations. Commonwealth v. Haddock, 415 Pa. Super. 603, 604-605, 609 A.2d 1387, 1387 (1992). And the Court certainly allowed questioning. However, the reason the Bucks County prosecutor dismissed the case is irrelevant to the present allegations. Whether Maynard was previously lying or not is for the trier of fact to decide. That

conclusion, which the defense sought to introduce by showing the conclusion, which the defense sought to introduce by showing the "dismissal" by the Bucks County prosecutor is not permissible. The state of mind of the Bucks County prosecutor is not proper evidence of Maynard's credibility and is irrelevant to whether the present acts were or were not committed. Therefore, the ruling of this Court that the defense could show that the Bucks County charges have been concluded is proper. The Court's ruling that the reason the District Attorney in Bucks County chose not to pursue the case has no bearing or place in the present trial is not error.

Sixth, the defendant argues that this Court erred in restricting the cross

examination of David Maynard about his prior acts of sexual misconduct and allegations of the same leading to the charges against the defendant. The defense wished to question David Maynard about certain "bizarre behavior" that occurred when he was eleven (11) or twelve (12), including soiling his underwear, urinating in this room, the deterioration of his schoolwork, and the theft of this mother's nightgowns and underwear. The purpose of this testimony was to prove that Maynard was sexually abused as a child, before any conduct with the defendant occurred, so that any sexual knowledge was not solely obtained from sexual relations with the defendant. Such testimony is barred by the Rape Shield Law, which provides:

> Evidence of specific instances of the alleged victim's past.
> (a) General rule - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this Chapter except in prosecutions under this Chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S.A. §3104(a).

The testimony that the defense wished to elicit all related to David Maynard's "sexual conduct" during the time period in question. Maynard's past history, sexual and non-sexual, used to show the source of sexual knowledge is all part of his past sexual conduct. This is certainly evident by the defense's attempt to

show sexual knowledge from these acts. As such, past sexual conduct is protected by the Rape Shield Law. See Commonwealth v. Appenzeller, 388 Pa. Super. 172, 565 A.2d 170 (1989); See Commonwealth v. Berry, 355 Pa. Super. 243, 513 A.2d 410 (1986).

In addition, even if the testimony were allowed, the purpose of this expert testimony, according to the defendant, would have been to rebut the prosecution's inference that the victim obtained this sexual knowledge from the only available source - the defendant. In fact, the defendant points out that this exact argument was made by the prosecution. (D.M., p. 66; objected to by defense counsel and sustained because there was no testimony or prosecution expert provided on this point.

Since the argument was not made by the prosecution, no rebuttal was necessary or proper and there was no error in precluding it. Last, the defendant contends that his trial counsel was ineffective because he failed to file a notice of alibi, failed to file pretrial motions for timely discovery, failed to provide the Commonwealth with timely notice of his intention to call an expert, and failed to raise the issue of Dr. Sefarbi's status. Claims of ineffectiveness of counsel are adjudicated by applying a three part test. First, the underlying claim must be of arguable merit. Second, counsel's choice of action must have had some reasonable basis designed to effectuate his or her client's interests. Third, the client must have been

prejudiced by counsel's actions. Commonwealth v. Cummings, 422 Pa. Super. 202, 206, 619 A.2d 316, 318 (1993), quoting Commonwealth v. Meschall, 405 Pa. Super. 326, 330, 592 A.2d 687, 689 (1991); Commonwealth v. Murphy, 527 Pa. 309, 311, 591 A.2d 278, 279 (1991). "When considering the prejudice component of a claim that counsel was ineffective, the focus is on whether one can say with confidence that the jury would have returned a guilty verdict if counsel had provided effective representation." Commonwealth v. Groff, 378 Pa. Super. 353, 382-383, 548 A.2d 1237, 1247 (1988). Defendant's trial counsel withdrew after the trial and present counsel entered his appearance.

Defendant's first claim is that trial

counsel entered his appearance.

Defendant's first claim is that trial counsel was ineffective for failing to file a Notice of Alibi Defense. Such failure did not prejudice defendant. As discussed above, while the defendant's location between three (3) and five (5) p.m. could not be testified by Stephen Rudnick, the whereabouts of David Maynard, a necessary party to the crimes, were accounted for at all relevant times. Therefore, the same evidence relating to the impossibility of the defendant and David Maynard being alone between three (3) and five (5) p.m. was received into evidence, despite the stricken alibi testimony. Therefore, there was no prejudice to the defendant.

The defendant also argues that trial

counsel was ineffective for failing to ask for a continuance so the Commonwealth could have investigated the alibi defense. However, as the defendant himself points out, a continuance is within the broad discretion of the trial judge to grant. Commonwealth v. Feflie, 398 Pa. Super. 622, 635, 581 A.2d 636, 643 (1990), allocatur denied, ___ Pa. ___, 597 A.2d 1151 (1991). The defendant has not shown that a continuance would have been granted. Therefore, there is no actual prejudice to the client, and this claim fails the third part of the test. Likewise, as discussed above, because the same evidence was admitted anyway, there was no prejudice by failing to request a continuance.

The defendant next contends that counsel

was ineffective because he failed to file pretrial-motions for timely discovery. The defendant filed requests for discovery on January 13 and January 14, 1992 and a request for a Bill of Particulars on February 28, 1992. A Motion to Compel Discovery was not filed until August 3, 1992. The defendant contends that this late filing of the Motion to Compel Discovery was ineffective assistance of counsel. However, discovery was in fact provided to trial counsel by the prosecution and he had all discovery from the Bucks County file. As a result, the decision not to file the Motion to Compel until August was irrelevant since trial counsel had all discoverable materials from Bucks County and from the prosecution. Therefore, trial

counsel's choice was not prejudicial. Also, under the second part of the test, trial counsel's choice might have been aimed at discovering any new evidence and need not have been filed earlier. In that case, it would have been reasonably designed to promote his client's interests by getting only newly acquired evidence.

Next, the defendant argues that trial counsel failed to provide the Commonwealth with timely notice of his intention to call an expert. In order to be prejudicial, the expert would have to have been permitted to testify. As discussed above, the testimony of defendant's expert as to David Maynard's knowledge of sexual acts from previous sexual child abuse was not permissible. Therefore,

the lack of notice had no effect on the outcome and no prejudice to the defendant.

Last, the defendant contends that trial counsel was ineffective for failing to raise the issue of Dr. Sefarbi's status under 42 Pa.C.S.A. §5944 and Pa.C.S.A. §5945.1. First, as discussed above, the evidence on which Dr. Sefarbi's expert opinion was to be based was inadmissible under the Rape Shield Law. Therefore, the Doctor would not be able to give an opinion based on this evidence and her testimony would not be permissible. Thus, defendant was not prejudiced by trial counsel's failure to raise her status. Second, since Dr. Sefarbi's records are privileged and, thus, inadmissible, properly raising the issue of her status would not have

changed the outcome of the court's ruling and, therefore, was not prejudicial to the defendant.

CONCLUSION

Based on the foregoing analysis, the decision of this Court is proper and should be AFFIRMED.

BY THE COURT:

ALBERT R. SUBERS, J.

Copy of foregoing opinion sent to:
Thomas C. Egan III, Esquire, ADA
Allan J. Sagot, Esquire

Secretary on 12/16/93